

REMARKS

Applicant wishes to thank the Examiner for reviewing the present patent application. As to the amendments, no new matter has been added and support for the same may be found, among other places, at pages 1, 4 and 7 of the specification as originally filed.

I. Rejection Under 35 USC §1.112, Second Paragraph

Applicant has amended claim 9 and claim 24. Support for the amendment for claim 9 may be found, among other places, on page 4 of the specification as originally filed. Support for the amendment to claim 24 may be found, among other places, on page 1 of the specification as originally filed. Based on these amendments, it is respectfully requested that the rejection made under 35 USC §112, second paragraph be withdrawn and rendered moot.

II. Claim Objections

The Examiner has objected to claims 3, 4, 13, 18, 20 and 21 and mentions that the claims need periods. Applicant appreciates the Examiner's assistance and has amended the claims accordingly. Therefore, the objections to the claims should be withdrawn and rendered moot.

III. Obviousness-type double patenting

The Examiner has provisionally rejected claims 1-25 under the judicially created Doctrine of Obviousness-Type Double Patenting as being unpatentable over claims 1-28

of co-pending application no. 10/722,783. Although the claims are not identical, the Examiner mentions that they are not patentably distinct from each other because the same beverage composition is claimed.

While Applicant respectfully disagrees, Applicant is submitting herewith a terminal disclaimer as requested by the Examiner so that the prosecution of the present application may be expedited and so that Applicant can further business objectives. In view of this, it is respectfully requested that the rejection made under the Doctrine of Obviousness-Type Double Patenting be withdrawn and rendered moot.

IV. Rejection Under 35 USC §103

The Examiner has rejected claims 1-18 and 24 and 25 under 35 USC §103 as being unpatentable over Zeller et al., U.S. Patent No. 6,168,819 (hereinafter, '819) in view of Kaper, EP 0745329 (hereinafter, '329) and Bolt et al., GB 2 299 978 (hereinafter, '978).

In the rejection, the Examiner mentions, in summary, that the '819 reference discloses a method for making a containerized beverage product which has a container holding a composition of octenylsuccinic acid modified starch and a surfactant such as sodium stearoyl lactylate. The Examiner further mentions that protein is employed and it is denatured whey protein, that gasified liquid compositions are shown in the '819 reference and that the compositions of the '819 reference are gasified to a bulk density of 0.1 to 0.55 g/cc.

The Examiner relies on the '329 reference for showing that it is known to make a carbonated coffee beverage and the '978 reference for showing that its known to use nitric oxide in a pressurized container to pressurize a milk containing beverage. The

Examiner further mentions that it is known that carbon dioxide imparts a sharpness of flavor to milk and such a result may not be desirable. Even further, the Examiner believes that it would have been obvious to use the claimed starch as shown in the '819 reference, and that it is within the skill of the ordinary worker to determine molecular weights and amounts to be used. The Examiner also mentions that the '819 reference discloses the use of whey protein concentrate or isolate and that the '978 reference discloses the use of dairy milk or skim milk, both of which contain caseinate.

Finally, the Examiner believes that the widget of claim 24 is modifying a beverage and that no weight is given to an apparatus limitation in a composition claim. Based on the foregoing, the Examiner believes that the rejection made under 35 USC §103 is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicant's position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

The present invention as set forth in independent claim 1, as amended, is directed to a beverage product comprising a sealed container holding a liquid beverage component and nitrogen gas, the liquid beverage component comprising octenylsuccinic acid modified starch and at least one surface active agent selected from the group consisting of acyl lactylate salts, proteins, protein hydrolysates, sucrose esters and mixtures thereof, wherein the beverage product, when opened, forms a foam on top of the liquid beverage, the foam not exceeding about 20% volume of the liquid beverage.

The invention of claim 1 is further defined by the dependent claims which claim, among other things, the pressure of nitrogen in the headspace of the container, the means for preparing the octenylsuccinic acid modified starch, the type of octenylsuccinic acid (e.g., the one being a carboxy substituted undecenoic acid), the molar substitution of the octenylsuccinic acid groups, the molecular weight of the octenylsuccinic acid modified starch, the amount of octenylsuccinic acid modified starch employed in the beverage product, the type of acyl lactylate salt, the amount of acyl lactylate salt used, the type of protein, the type of sucrose ester, the type of fatty acid, the amount of sucrose ester employed, and that the beverage product is one with a device to assist in putting a head on the beverage component.

Independent claim 25 is directed to a method of making a beverage product like the one depicted in independent claim 1 of the present invention, as amended.

In contrast, the '819 reference is merely directed to cappuccino creamer with improved foamy characteristics. The creamer comprises protein, lipid and carrier wherein more than 50% by weight of the protein is partially denatured whey protein and the partially denatured whey protein is from 40 to 90% denatured. Nothing in the '819 reference even remotely suggests a beverage product as claimed in the present invention. Particularly, nothing in the '819 reference suggests a container for holding a liquid beverage component and nitrogen gas where the liquid beverage component within the container comprises octenylsuccinic acid modified starch and at least one surface active agent. Moreover, nothing in the '819 reference even remotely suggests that a beverage component with such modified starch may be placed within a container where the pressure of nitrogen in the headspace of the container is in the range of about 2 to about 6 bar at 5°C. The present invention is directed to a beverage component within a

container such that when the beverage product is opened and liquid component is poured out of the container, a desirable and significant amount of foam is produced after pouring. The '819 reference, again, is directed to a creamer. The creamer in the '819 reference is suitable for use, for example, when being injected with a gas apparatus.

None of the vast deficiencies of the '819 reference are even remotely cured by the secondary references since the '329 reference is directed to carbonated coffee beverage in a container and in the presence of CO₂ and nitrogen, and the '978 reference is merely directed to a milk containing beverage (within a container) containing a dissolved gas. When the container of the '978 reference is broached and beverage is poured out, produced is a milk-shake like effect (resulting in a frothy like beverage).

None of the teachings relied on by the Examiner in any combination even remotely described the presently claimed invention, as amended. Therefore, a *prima facie* case of obviousness has not been established and the rejection made under 35 USC §103 is improper and should be withdrawn.

Applicants wish to point out that independent claim 1 is directed to a beverage container having a liquid beverage component therein. Independent claim 1 is not a composition claim. Weight should therefore be given to claim 24 since the same is further limiting the container and not merely a beverage composition.

V. Rejection Under 35 USC §103

The Examiner has rejected claims 19-23 under 35 USC §103 as being unpatentable over the above references as applied to the above claims, and further in view of Ueda et al., U.S. Patent No. 5,637,337 (hereinafter, '337).

In the rejection, the Examiner mentions, in summary, that claims 19-23 further require the use of sucrose ester as a monoester and in combination with particular fatty acids. The Examiner further mentions that the '337 reference discloses the use of such components. In view of this, the Examiner believes that it would have been obvious to the skilled artisan to use one or more of the same in the inventions set forth in the presently claimed application.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicant's position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

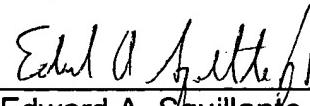
As already made of record, the present invention is directed to a superior beverage product comprising a sealed container holding a liquid beverage component and nitrogen gas, the liquid beverage component comprising octenylsuccinic acid modified starch and at least one surface active agent selected from the group consisting of acyl lactylate salts, proteins, protein hydrolysates, sucrose esters and mixtures thereof wherein the beverage product, when opened, forms a foam on top of the liquid beverage component, the foam not exceeding about 20% volume of the liquid beverage.

Dependent claims 19-23 further define the invention by describing the sucrose ester, the type of fatty acid and the amount of sucrose ester within the liquid beverage component. None of the references previously relied on by the Examiner even remotely describe a beverage product comprising a sealed container holding a liquid beverage wherein the beverage product, when opened, forms a foam on top of the liquid beverage component, the foam not exceeding about 20% volume of the liquid beverage. Moreover, none of the vast deficiencies of the previously relied on references are even remotely cured by the '337 reference since the '337 reference only describes a powdery anti-foaming agent for food wherein the powdery anti-foaming agent contains straight chained fatty acid glycerol monoester, lecithin, an agent for improving the water dispersibility and a powdery dextrin. Since no combination of references relied on by the Examiner even remotely describes the presently claimed inventions, as amended, Applicant respectfully requests that the obviousness rejection be withdrawn and rendered moot.

Applicant submits that all claims of record are now in condition for allowance. Favorable action and reconsideration are earnestly solicited.

In the event the Examiner has any questions concerning the present patent application, she is kindly invited to contact the undersigned at her earliest convenience.

Respectfully submitted,


Edward A. Squillante, Jr.
Attorney for Applicant(s)
Reg. No. 38,319

EAS:pod
(201) 894-2925